POWER OF ATTORNEY TO CONFESS JUDGMENT, LEGISLATION OF 1922.

Editor Virginia Law Register:

My attention was called, soon after the adjournment of the General Assembly of 1922, to the subject of the law and procedure *re* powers of attorney to confess judgment accompanying obligations to pay money. I have been endeavoring ever since to reach a conclusion which I felt worthy of communicating to the members of the Virginia Bankers Association, for which I am attorney. It has been difficult for me to do so, however. This is one of the most pronounced instances of both unnecessary and hasty legislation that I have seen for a long time—unnecessary, because, so far as I have heard, there was no demand for it growing out of grave public evil; hasty, in that it is evident that, although the two acts to which I refer were approved within four days of each other, the patron of each was apparently not aware that the other was on its way through the legislature—for, otherwise, they would surely have gotten together and withdrawn one or blended the two into one act.

However, we are confronted with the two and should analyze them. The titles of both are significant:

"Chapter 346 (Approved March 23, 1922)—An Act requiring every power of attorney to confess judgment *to be signed and acknowledged before some officer* authorized to take acknowledgments to deeds."

"Chapter 440 (Approved March 27, 1922)—An Act to regulate the confession of judgment *in the office of the clerk of any court of record* in the Commonwealth of Virginia and to prescribe the procedure therein."

The language of each act is reasonably apt for its title. The first thing to notice, therefore, is that the first act is a general one requiring *all* forms of power of attorney to confess judgment, whether in term or in the clerk's office in vacation, to be signed and acknowledged, while the second regulates *confessions in clerks' offices* only—in other words, the second act *makes no reference whatever to judgments confessed under power of attorney in open court.* Its language throughout is "such judgment," "such confession," "a judgment so confessed," i. e., in the clerk's office, "the said confession," etc.

Second. As to confessions in the clerk's office, the later act, being *in pari materia* with the first, must in my judgment be accepted as the statutory law of the subject. It contains the usual clause repealing all acts and parts of acts in conflict with it. While repeals by implication are not favored, any conflict between two acts concerning the same subject-matter will be resolved in favor of the provisions of the later act. An important question here, however, is, Is there any material conflict between these acts? The second is too long for insertion in full here. The first is as follows (Acts 1922, p. 588) (italics supplied):

"1. Be it enacted by the General Assembly of Virginia: That no power of attorney, hereafter executed, authorizing and empowering any person or attorney to confess any judgment, at any place or at any time, shall be valid *unless the attorney or other person authorized to confess judgment be named in the instrument,* and unless the same be signed and *acknowledged before some officer authorized by the laws of this State to take acknowledgments to deeds.* Any judgment confessed after this act becomes operative in pursuance of a power of attorney not in conformity with this act shall be *void.*

"Provided, however, that *nothing in this act* shall be deemed to apply to notes and bonds that have been, or may be, discounted and held by any bank or trust company.

"2. All acts, or parts of acts in conflict with this act are hereby repealed."

The first, second and third paragraphs of the second act are as follows (*Ibid,* p. 765):

"1. Be it enacted by the General Assembly of Virginia, That: (a) Any person being indebted to another person, may, at any time confess judgment *in the clerk's office of any court of record in this Commonwealth,* whether a suit, motion or action be pending therefor or not, for so much principal and interest as his creditor may be willing to accept judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court, and shall be as final and binding as though confessed in open court or rendered by the court, subject to the control of the court in which rendered, and may be set aside only for fraud or other like taint.

"(b) The clerk shall enter on the margin of the record of such judgment, the day and hour when the same was con-

fessed and the lien thereof shall attach and be binding from the time of such confession so entered.

"(c) Such confession of judgment may be made either by the debtor himself or his duly constituted attorney in fact acting under and by virtue of a warrant duly executed and acknowledged by him as deeds are required to be acknowledged, before any officer or person authorized to take acknowledgments of writings to be recorded in Virginia, and of the following tenor," etc.

The remainder of the act, for the most part, concerns purely administrative details incident to the entry of the judgment by the clerk.

Now whatever doubt there may be about the law in point, there are certain points which seem clear. Among these are

(a) That no power of attorney to confess judgment (*except* when contained in instruments discounted and held by a bank or trust company), whether in term time or in the clerk's office, executed on or after June 18, 1922, purporting to empower "any attorney of any court of record" to confess is valid. The power *must* mention the attorney by name. In the event of the death of the attorney before exercising the power, it must fail. It would, therefore, seem wise to provide for this as do the draftsmen of stock and other proxies—"A. B., C. D., E. F., or any one of them, my true and lawful attorney," etc.

(b) That, as indicated, the foregoing does not apply to powers contained in

"notes and bonds, *that have been, or may be, discounted and held* by any bank or trust company."

This is certainly very remarkable language. Daniel Debtor borrows from Charles Creditor $1,000, giving his note in usual form and a power of attorney to confess judgment which (1) does not contain the name of the attorney and (2) is not acknowledged before an officer. This form is now obviously void. But suppose Creditor take it to a bank and discounts it *bona fide* for value. Is the invalidity thereby removed? If not, what is the meaning of the proviso to the first of the Chinese puzzles, *supra?*

(c) That (a) and (b) apply only to notes containing power to confess *in term time*. Section 6130 of the Code of 1919, provides, among other things, that

"In any suit a defendant may in vacation of the court and

> whether the suit be on the court docket or not, confess a judgment in the clerk's office * * *. The same * * * shall be as final and valid as if entered in court," etc.

No exception in favor of paper held by banks and trust companies is made by the second of the 1922 acts. It would seem to follow that both individual and bank creditors, lending upon obligations containing a power of attorney to confess a judgment *in vacation* must conform with the provisions of the second act. These are not numerous—only two, in effect, *videlicet*: the naming of the attorney—although note that this is not by general provision required by the second act as in the first, but only in prescribing the form of the power, i. e., "do hereby constitute and appoint (name of attorney in full)"—and, second, acknowledgment before a proper officer.

The law of the subject has been rendered by the legislation quoted unnecessarily involved and complicated. Would it be asking too much of the next General Assembly (perhaps the possible extra session) *to repeal both statutes?* They only add to the expense of the debtor. No one seems thus far to have thought that the Notary's fee on each note is fifty cents or that a stamp tax of twenty-five cents must be paid the federal government on each "power and attorney." Further, the second act, reciting the form of the power, does not limit its operation to a default in payment. May the creditor enforce the power before maturity?

In *Edelen* v. *First National Bank* (Md.), 115 Atl. 602, it was held that

> A promissory note was negotiable which contained a provision, "Claim to exemption waived, and it is hereby further agreed that at any time judgment confessed shall be entered in a proper court against the maker or makers, and indorser or indorsers thereof, if any, for such sum as may be due thereon, and costs, and ten per cent. additional to said sum as a fee" to designated attorneys, in view of Code Pub. Gen. Laws, 1904, art. 13, § 24, as against an objection that it authorized a judgment to be confessed before maturity, for a negotiable instrument is not "due" until it matures or becomes payable according to its terms, and it is not until the time fixed in the note for its payment has arrived that any part of the sum it specifies is "due" in the sense in which that word is customarily used in such a connection, and as

thus employed it has regard to the maturity, and not merely the existence of the indebtedness (citing Words and Phrases, First Series, Due).

As long as the legislation remains in force, I propose to advise my clients, whether banks or individuals, who desire to take a sufficient form of power of attorney with each note, for prudential reasons to require a form drawn to at least three attorneys in fact, any one of whom may act, the form to be properly acknowledged. If, however, a power has been executed or a judgment confessed under a form which does not literally comply with either or both of the acts in question, I shall advise careful inquiry into the facts and law of each case upon the theory that the power may nevertheless be sufficient.

It is altogether a singular condition. The foregoing is written not in an over-critical spirit, but with the hope of evoking comment which shall be, as this is intended to be, constructive, helpful and a partial answer to the immortal question, Where are we at?

GEORGE BRYAN.

Addendum: Mr. John Martin, of the bar of South Boston, Virginia, has prepared a form of judgment note from the standpoint of the legislation, *supra,* as follows:

The Boston Printing Company, of South Boston, is prepared to supply these forms to attorneys, banks and others at reasonable prices.

$.....

SOUTH BOSTON, VIRGINIA,.....192....

.....After date.....promise to pay

To the order of.....

.....DOLLARS. Value received, without offset. Homestead and all other exemptions, protest, presentment and notice of dishonor as to this debt are hereby waived by the maker or makers, endorser or endorsers hereof.

Negotiable and payable at **BOSTON NATIONAL BANK, South Boston, Va.**

If this note is collected by an attorney we hereby agree to pay 10 per cent. collection charges on the amount due on same at time of collection.

To the Clerk of the Circuit Court of Halifax County, Virginia, Greeting: Be it known to you that....., ...am justly indebted to....., in the sum of $....., with interest thereon from.....as to which debt.....hereby waive the benefit of the homestead and all other exemptions; and do hereby constitute and appoint.....true and lawful attorney in fact, and with full power and authority hereby given to appear before you in your said office and for.....to confess judgment before you therein against.....in favor of the payee of this note, or assigns, for said sum of money with interest thereon from.....until paid, together with the cost of confessing and entering up said judgment; and we further agree to pay an attorney's fee for the collection of said note of 10 per cent. of said principal sum, and accrued interest, due thereon, and for which..... authorize said attorneys in fact to confess judgment against .....with waiver of the homestead and all other exemptions.

Given under.....hand....and seal....this.... day of.....19....

No..... .....(Seal)

Due..... .....(Seal)

State of Virginia,)
County of Halifax,) To-wit:

I, ..., a Notary Public of and for the county and State aforesaid, do certify that..... .....whose name.....signed to the foregoing note, bearing date on the.....day of.....192....ha.....acknowedged same before me in my county aforesaid.

Given under my hand this.....day of.....19.

.....

My commission expires Notary Public
.....19....